of the 3rd Defendant, or the notice of renewal of the 1st and 2nd Defendants' application to the full court. The indictment has never been produced to us. The copy of the judge's note was incomplete and did not indicate that it was incomplete, save that it was obvious that a written outline of the facts and some confessions had been produced to the court and not included.

Appeal allowed.

Solicitors: *David Clidero & Co.*

ZULKIFLI BIN PUASA & ORS. v. PUBLIC PROSECUTOR

[C.A. (Sir Geoffrey Briggs, P., Sir Alan Huggins & Bewley J., Judicial Commissioners) November 28, 1984]

[Bandar Seri Begawan – Criminal Appeal No. 6 of 1984]

Criminal law and Procedure – Rape – Extension of time to appeal – Validity challenged – Question of sentence – Misunderstanding – Factors considered in extension of time.

The eight applicants were on September 12, 1984 convicted of rape and each was sentenced to eight years' imprisonment. On October 3, they filed an application for an extension of time within which to lodge an application for leave to appeal, time having expired on September 26. On October 4, the Chief Justice, as a single judge of this court, made an order extending the time and the application for leave duly came before the Court of Appeal, where the validity of the order was challenged by the Public Prosecutor.

Held: (1) it is not necessary or desirable that the Court should decide what in fact was said in the court below. The fact that there existed a possibility of misunderstanding justifies the Court in making an assumption that no application was made and therefore that there was no abandonment which could bar the present application;

(2) there are two factors to be considered upon an application for an extension of time, (1) the length of the delay and whether it can be satisfactorily explained and (2) whether the out of time application is likely to succeed;

(3) in view of the circumstances of the present case the applicants can have no justification for feeling aggrieved at receiving sentences of eight years' imprisonment. The order granting extension of time should be set aside and application for leave to appeal against sentence would be dismissed.

Cases referred to:

(1) *R.* v. *Rhodes* (1910) 5 Cr. App. R. 35.
(2) *R.* v. *Rigby* (1923) 17 Cr. App. R. 111.
(3) *Public Prosecutor* v. *Nasar bin Ahmad,* Bandar Seri Begawan Criminal Trial No. 15 of 1984 (unreported).

CRIMINAL APPEAL.

Ali Kawi for 1st, 2nd, 3rd, 5th, 6th, 7th & 8th appellants.

D.F. Abang Zen for 4th appellant.

Ivan Leong (Deputy Public Prosecutor) for Public Prosecutor.

Cur. Adv. Vult.

Sir Alan Huggins J.A.: The eight Applicants were on September 12, 1984 convicted of rape and each was sentenced to eight years' imprisonment. On October 3, they filed an application for an extension of time within which to lodge an application for leave to appeal, time having expired on September 26. On October 4, the Chief Justice, as a single judge of this court, made an order extending the time and the application for leave duly came before us.

The Public Prosecutor, as a preliminary issue, challenged the validity of the Chief Justice's order. First, he alleged that there had been a previous application for leave to appeal, that that application had been abandoned and that no further application could be entertained. Secondly, he submitted in the alternative that, the order extending the time having been made in the absence of the parties and there being no sufficient ground for the making of the order, it should be set aside *ex debito justitiae.*

The first argument was based upon what happened in the lower court immediately after sentence had been passed. The Public Prosecutor asserts that counsel for the Defendants applied to the judge for leave to appeal and that, after a short adjournment at the instance of the judge for counsel to confirm that they wished to appeal, counsel indicated that the Defendants did not wish to appeal, and the application for leave was withdrawn. Initially it was argued that the appeal was thereupon deemed to have been dismissed under rule 51 of the Brunei Court of Appeal Rules. However, when it was pointed out that rule 51 related to cases where an appeal was abandoned by notice in writing in the prescribed form and that no such notice had been given here, the Public Prosecutor based his argument solely on the common law: he submitted that an abandonment in the face of the court was an invitation to the court to dismiss the appeal and that, unless and until the abandonment was, for good reason, allowed to be withdrawn,

there was no jurisdiction to hear a further application. This view of what happened was supported by the judge's note, which reads:

"Application for leave to appeal on behalf of each prisoner adjourned generally".

"Application for leave to appeal withdrawn on behalf of each prisoner".

Counsel for the Applicants, who appeared for them also at the trial, says there has been a misunderstanding and that what he told the judge was that he wished to consider making an application for leave to appeal: he then sought an adjournment to consult his clients. His contention is that thereafter he informed the court that his clients did not wish to appeal, so that no such application was in fact made and no question of abandonment ever arose.

Had the judge purported to record the *ipsissima verba* of counsel we might have felt bound to accept his note as conclusive, but he did not, and the possibility remains that he did misunderstand what had been said. If so, it was a misunderstanding shared by the prosecutor. On the other hand it is, perhaps, more likely that counsel would seek an adjournment to take instructions whether to seek leave to appeal rather than whether to abandon an application which he had only just made.

We do not think it is necessary or desirable that we should decide what in fact was said in the court below. The fact that there existed a possibility of misunderstanding justifies us in making an assumption that no application was made and, therefore, that there was no abandonment which could bar the present application. Thereby we give the benefit of the doubt to the Applicants and avoid the risk of their having a reasonable sense of grievance.

We turn to the alternative complaint about the Chief Justice's order. Neither party was present at the time the order was made: the application was decided upon the papers. The Public Prosecutor contends that this was a breach of the rule *audi alteram partem*, that there was no sufficient ground to support an order for an extension of time and that the order should be set aside. Had there been a judge resident in the State such an application ought to have been made to him without delay, but in the event it was made to this court at the beginning of the session. Counsel says that, if notice had been given, he would have strongly opposed the order, as he has done before us: the Chief Justice appears to have granted an extension as a matter of course and gave no reasons.

There may be cases where there is a need for great expedition, or where it is obvious that there can be no effective opposition and it is permissible to proceed *ex parte*. This was not one of them and, although we can understand the anxiety of the Chief Justice to dispose of the matter before he returned to Hong Kong, we think it was wrong to have denied the Public Prosecutor an opportunity to be heard. Nevertheless, we would not have set aside the order at this stage if we had thought there was any merit in the appeal.

There are two factors to be considered upon an application for an extension of time, (1) the length of the delay and whether it can be satisfactorily explained, and (2) whether the out of time application is likely to succeed.

Where, as here, the delay is of short duration the court may, if it thinks fit, disregard the delay, even in the absence of satisfactory reasons, but, where a substantial interval of time (a month or more) has elapsed, an extension of time will not be granted, as a matter of course, without a satisfactory explanation: see *Rhodes*[1]. Where the delay is minimal the court will still not grant an extension of time if the application for which the extension is sought is bound to fail: there must be an arguable case. Moreover, even though the subsequent application may be likely to succeed – as where a fellow-prisoner's conviction has been quashed – the court will not grant an extension of time as a matter of course: see *Rigby*[2]. The entire circumstances will be considered.

The truth of the matter is that, on the day on which sentence was passed, the Applicants were advised as to their rights and decided not to proceed with an appeal. It was only when they learned that another defendant had received a shorter sentence, for an unrelated crime of rape, that they changed their minds.

It is, of course, desirable that there should be a measure of consistency in the sentences passed upon different defendants for comparable offences and this court will not hesitate to interfere where that is necessary to maintain consistency. Here counsel for the Applicants submits that in *Public Prosecutor* v. *Nasir bin Ahmad*[3], which was decided after the present case, the sentence of 7 years' imprisonment was imposed for an obviously more serious offence. We do not agree. We appreciate

that Nasar, unlike the Applicants, had a previous criminal record, but in our view the circumstances of the present case were more serious and the Applicants can have no justification for feeling aggrieved at receiving sentences of eight years' imprisonment.

It follows that we think this was not a case where an extension of time should have been granted. The order granting an extension of time is set aside and the application for leave to appeal against sentence is dismissed.

Application dismissed.

Solicitors: *Alli Kawi & Co.; D.F. Abang Zen.*

TING SEH HING v. PUBLIC PROSECUTOR

[A.Cr.J. (Roberts C.J.) January 28 & 29, 1985]

[Kuala Belait – Criminal Appeal No. 5 of 1984]

Customs & Excise – False customs declaration – Attempting to export uncustomed goods – Vehicle used in commission of offence – Whether forfeiture mandatory – Customs Enactment No. 5 of 1954, ss. 117, 118, 124(1)(a) & 126(1)(a).

The appellant pleaded guilty to 2 charges under the Customs Enactment No. 5 of 1954, firstly with making a false customs declaration contrary to section 124(1)(a) and secondly with attempting to export uncustomed goods contrary to section 126(1)(a) of the Enactment. The Magistrate imposed fines and ordered the forfeiture of the goods and a truck used in the commission of the offence against section 126. This appeal was against the order for forfeiture of the truck.

Held: dismissing the appeal: (1) the Magistrate was correct in concluding that an offence under the Enactment had been committed and that the truck falls within the expression "the goods were used in the commission of the offence";

(2) the wording of section 118 imposes an obligation on the court to order forfeiture of the vehicle, once the conditions of section 117 are satisfied, whether or not there is an application for forfeiture by the prosecution.

Cases referred to:

(1) *Chai Min Chow & Anor.* v. *R.* [1956] S.C.R. 40.
(2) *R.* v. *Tan Long Cher* [1958] S.C.R. 60.
(3) *Re Tan Han Leong* [1959] S.C.R. 31.

CRIMINAL APPEAL.

Daljit Singh Sandhu for the appellant.

James Chiew (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Roberts C.J. : The appellant pleaded guilty to 2 charges under the Customs Enactment No. 5 of 1954 ("the Enactment"), first, with making a false customs declaration contrary to section 124(1)(a) and secondly with attempting to export uncustomed goods contrary to section 126(1)(a).

The Magistrate fined the appellant $1,000, or one month's imprisonment in default, on the 1st charge; and $600, or one month's imprisonment in default, on the 2nd charge. She also ordered the forfeiture of the various goods which were the subject of both charges and of a truck, registration number MD 420, which she found to have been used in the commission of the offence against section 126.

It is against the order for forfeiture of the truck that the appeal is brought. Section 117 of the Enactment reads as follows:

"Any order for the forfeiture or for the release of anything liable to forfeiture under the provisions of this enactment shall be made by the court before which the prosecution with regard thereto has been held. *And an order for the forfeiture of goods shall be made if* it is proved to the satisfaction of the court that an offence against this enactment or any regulation made thereunder has been committed and that the goods were the subject matter of or were used in the commission of the offence notwithstanding that no person may have been convicted of such offence.

I have no doubt and, indeed, it was not argued to the contrary, that the magistrate was correct in concluding that an offence under the Enactment had been committed and that the vehicle falls within the phrase, "the goods were used in the commission of the offence", since clearly the lorry was being so employed when it was carrying the smuggled articles.

Counsel for the appellant has sought to persuade me that the wording of section 117 confers a discretion upon a magistrate, and that the phrase, "an order for the forfeiture of goods shall be made", is not mandatory.

I see no reason not to give to the word "shall"